

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

YICK HUNG SIM,

Petitioner,

v.

UNITED STATES CITIZENSHIP AND  
IMMIGRATION SERVICES; TOM RIDGE,  
Secretary of the Department of  
Homeland Security; EDUARDO AGUIRRE,  
Director, United States Citizenship  
and Services; DAVID N. STILL,  
District Director, United States  
Immigration and Citizenship Services,  
San Francisco; and United States  
DEPARTMENT OF HOMELAND SECURITY,

Respondents.

No. C 04-4643 CW

ORDER DENYING  
PETITIONER'S  
MOTION FOR  
ATTORNEYS' FEES  
UNDER THE EQUAL  
ACCESS TO  
JUSTICE ACT

Petitioner Yick Hung Sim moves for an award of attorneys' fees and costs in the amount of \$1,576.04 under the Equal Access to Justice Act (EAJA). Respondents oppose the motion. Having considered all of the papers filed by the parties, the Court DENIES Petitioner's motion.

## BACKGROUND

Petitioner seeks to recover fees and costs he incurred in litigating a petition for review filed on November 2, 2004. In that petition, Petitioner sought review of the United States Citizenship and Immigration Services' (USCIS) denial of his application for naturalization. According to Petitioner, the USCIS improperly declared him ineligible for naturalization because it failed to consider two disability waivers that would have exempted him from the English language requirement and the requirement that he demonstrate knowledge of United States history and government. The petition for review requested a de novo proceeding on Petitioner's naturalization application and attorneys' fees and costs under 28 U.S.C. § 2412.

On February 16, 2005, the government filed a notice of intent to reopen Petitioner's naturalization application for favorable adjudication, stating that the USCIS had "reconsidered" Petitioner's medical certifications and had approved the disability waivers. On June 3, 2005, the government filed a notice of favorable adjudication of Petitioner's naturalization application and requested that the Court dismiss this action as moot. On June 13, 2005, Petitioner filed an opposition in which he requested that the Court retain jurisdiction over his case in order to consider his request for attorneys' fees and costs under § 2412.

Because Petitioner was scheduled to become a naturalized United States citizen on June 21, 2005, the Court dismissed as moot Petitioner's petition for review of the USCIS's decision and allowed Petitioner to file an application for attorneys' fees and

1 costs in accordance with § 2412. Judgment dismissing the petition  
2 and setting a briefing schedule for Petitioner to file this  
3 application for attorneys' fees was entered accordingly.

4 Petitioner filed a timely motion for attorneys' fees under the  
5 EAJA on August 4, 2005.

6 DISCUSSION

7 The EAJA states,

8 A court shall award to a prevailing party other  
9 than the United States fees and other expenses  
10 . . . incurred by that party in any civil  
11 action (other than cases sounding in tort),  
12 including proceedings for judicial review of  
13 agency action, brought by or against the United  
States in any court having jurisdiction of that  
action, unless the court finds that the  
position of the United States was substantially  
justified or that special circumstances make an  
award unjust.

14 28 U.S.C. § 2412(d)(1)(A).

15 Petitioner asserts he is a prevailing party under the EAJA  
16 because his filing of the petition for review motivated the USCIS  
17 to reconsider his application for naturalization.

18 Under the EAJA, "a party need not prevail on all issues" to be  
19 considered a prevailing party. City of Carmel-By-The-Sea v. United  
20 States Dep't of Transp., 123 F.3d 1142, 1167 (9th Cir. 1997). A  
21 plaintiff may be considered a "prevailing party" under the EAJA if  
22 it "succeed[s] on any significant issue in litigation which  
23 achieves some of the benefit [it] sought in bringing suit." United  
24 States v. Real Property Known as 22249 Dolorosa Street, 190 F.3d  
25 977, 981 (9th Cir. 1999)(internal quotation marks omitted).  
26 However, to prevail, a party must have been awarded some relief by  
27 the courts. Buckhannon Bd. and Care Home, Inc. v. West Virginia

1 Dept. of Health and Human Resources, 532 U.S. 598, 603 (2001).

2 This is satisfied by securing a judicially-sanctioned change in the  
3 parties' legal relationship, through an enforceable judgment on the  
4 merits or through a court-ordered consent decree. Id.

5 The argument that the plaintiff prevails "if it achieves the  
6 desired result because the lawsuit brought about a voluntary change  
7 in the defendant's conduct" is incorrect. Buckhannon, 532 U.S. at  
8 610. In Buckhannon, the Court specifically rejected this "catalyst  
9 theory" as an impermissible basis for awarding attorneys' fees.

10 Id. Although Buckhannon defined "prevailing party" under the Fair  
11 Housing Amendments Act, id. at 601, the Ninth Circuit has since  
12 found its reasoning "persuasively applicable to an award of  
13 attorneys' fees under the EAJA." Perez-Arellano v. Smith, 279 F.  
14 3d 791, 794 (9th Cir. 2002); see also Bennett v. Yoshina, 259 F.3d  
15 1097, 1100 (9th Cir. 2001) ("There can be no doubt that the Court's  
16 analysis in Buckhannon applies to statutes other than the two at  
17 issue in that case.")

18 Perez-Arellano is factually similar to this case. In Perez-  
19 Arellano, the court denied the petitioner's request for attorneys'  
20 fees "because the INS voluntarily granted his application for  
21 naturalization. His change of status was the result of the INS'  
22 voluntary decision and was not compelled by the district court."  
23 279 F.3d at 795; see also Maduka v. Meissner, 114 F.3d 1240, 1242  
24 (D.C. Cir. 1997) (attorneys' fees denied because the court did not  
25 cause the INS to approve a visa application).

26 Petitioner claims he is a prevailing party because the court  
27 intervened and issued an order on his behalf. This order, dated  
28

1 February 22, 2005, states,

2 Pursuant to respondents' notice of intent to  
3 reopen Mr. Sim's naturalization application for  
4 favorable adjudication, and good cause  
5 appearing therefor, the Court hereby VACATES  
6 the scheduling order of February 14, 2005.  
7 Respondents shall provide the Court with  
8 evidence no later than March 11, 2005 of the  
9 favorable adjudication of Mr. Sim's  
10 naturalization application.

11 However, the Court's order was issued after Respondents filed on  
12 February 16, 2005, their notice of intent to reopen Petitioner's  
13 naturalization application for favorable adjudication.

14 Petitioner's change of status in this case was due to the USCIS'  
15 decision to reconsider his application for naturalization, not to  
16 an enforceable order of this Court. Furthermore, the judgment  
17 merely states that the Court will vacate the scheduling order; it  
18 grants Petitioner no relief nor does it change his status. Thus,  
19 Petitioner is not a "prevailing party" under the EAJA.

20 Petitioner's reliance on Abela v. Gustafson and Rueda-  
21 Menicucci v. INS is misplaced. In Abela, 888 F.2d 1258, 1261 (9th  
22 Cir. 1989), EAJA fees were upheld because the court granted the  
23 appellees' motion to schedule for final hearing and determination  
24 their pending petitions for naturalization. In Rueda-Menicucci,  
25 132 F.3d 493, 495 (9th Cir. 1997), attorneys' fees were upheld when  
26 the court remanded for further agency action an application for  
27 asylum and withholding of deportation. In both cases, definitive  
28 court action led to the desired result, which made the parties in  
question "prevailing parties." Here, however, the USCIS acted  
voluntarily. Therefore, Petitioner is not a prevailing party.  
Petitioner's motion for attorneys' fees is denied.

CONCLUSION

For the foregoing reasons, the Court DENIES Petitioner's motion for attorneys' fees.

IT IS SO ORDERED.

Dated: 3/9/06



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CLAUDIA WILKEN  
United States District Judge